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AN EXAMINATION OF WILKERSON VS. RAHRER, 140 U. S. 545.

Kansas, by its constitution, provided that the manufacture and sale of intoxicating liquors should be forever prohibited, except for medical, scientific and mechanical purposes. A statute of the state declared guilty of a misdemeanor any person who should manufacture, sell, or barter "any intoxicating liquor." While this statute was in existence, congress passed the so-called Wilson Bill, which became a law on August 8, 1890. On August 9, 1890, Rahrer, as agent for a Missouri firm, sold a keg of beer which had been brought from Missouri for the purpose of sale. Rahrer was arrested by Wilkerson, sheriff, for violating the Kansas law. He applied to the Circuit Court of the United States for a habeas corpus, alleging that the Kansas Act was, as to the sale that he had made, in excess of the state's legislative power. That court discharged him, adopting his contention. On appeal to the Supreme Court of the United States, that court held that the arrest and punishment of Rahrer were within the power of Kansas.

That the Circuit Court could discharge Rahrer, if the state Act, under which he was held in custody, was

a violation of the Constitution of the United States, was not contested. But was it such a violation?

It penalized the act of selling, in the original package by the importer, or his agent, an article of commerce brought into the state from another state. As to such act, the statute when enacted was void. It remained void, until the enactment of the Wilson Act. Did that Act give it validity? It provided that all intoxicating liquors or liquids "transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages and otherwise."[1]

In virtue of this statute, **in re Rahrer** decides that the state law imposing a penalty on one who sells in the original package a keg of beer, brought into the state from another, is valid. How is this result reached?

Is the statute of congress to be regarded as imposing the penalty imposed by the state? If it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, so says Fuller, C. J. He adds: It must not be a law passed in the exercise of the police power. But why? May not congress in fashioning its statutes, in the exercise of the commerce power, the post office power, etc., be guided by the considerations which guide the exercise in the states of the police power? It can exclude lottery matter from the

[1]Barnes Fed. Code p. 2006. 8350.

mails.[2] In the exercise of the interstate commerce power, it can as do the states, in exercising their police power, regulate the liability of carriers to their employes who are injured while engaged in such commerce.[3] In the exercise of the war power, it can interfere with the sales of intoxicants.[3a]

Why then can the congress not so exercise the commerce power, as to compel those enaged in certain forms of commerce, or in commerce in certain sorts of things, to observe the wishes of the several states, as expressed in their legislation?[4] It is an idle fancy of an opinion writer that police considerations cannot influence the exercise of the substantive powers of congress.

But it is unnecessary to consider whether congress could penalize acts done in violation of state laws, which laws, as respects such acts, were in violation of the Federal Constitution, for the Wilson Act does not profess to do so. Rahrer was not accused of violating a law of the United States, but a law of Kansas. It was necessary, in order to sustain a conviction to find that the Kansas statute, as applied to his sale of the keg of beer, was valid.

Can congress enlarge the powers of the states? Having without the Wilson Act, no power to punish a sale in the original package by the importer of imported beer, can congress bestow this power? The answer

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[2]In re Rapier, 143 U. S. 110.

[3]Second Employer's Liability Cases, 223 U. S. 254.

[3a]Hamilton vs. Kentucky Distilleries Company, 40 Super. Ct., Rep. 106.

[4]Of the cases cited by Fuller, C. J., Green vs. Barry, 15 Wall 610, has no relevancy. Nor has Cooley vs. Board, 12 How 299. U. S. vs. DeWitt 76 U. S. 41, holds sipmly that there is no police power, (acting within a state) of the United States, when it is not an ingredient of some other power.

given by Fuller, C. J., is "Nor can congress transfer legislative powers to a state, nor sanction a state law in violation of the Constitution." If, then, the Kansas Act is valid, it does not derive its validity from the concession by congress, of the power to enact it.

In order to uphold the law, then, it is necessary to find that there was power to pass it, independently of the Wilson Act. Prior to this Act, Iowa had passed a statute similar to that of Kansas, and as applied to an import, from a state, it had been held unconstitutional.[5] If, then, such a state law, before the enactment of the Wilson Act, was unconstitutional and void, how does it happen that such a statute passed since the Wilson Act will sustain a conviction? Here is room for the play of the sublety which is often so dear to the heart of the justices of the supreme court.

There may be two kinds of state powerlessness. The state may have no power at all, or it may have a conditional power; that is, a power, when e. g. congress has no will against its exercise, but a want of power, whenever congress has such will. So, the difficulty furnished by the hypothesis that the Wilson Act has enlarged the state's power; that is, has broadened the area, over which it may operate, is evaded by the conception that it all along has the power, unless this power is obstructed by the will of congress.

And there are two kinds of wills of congress. The explicit conscious will expressed constitutionally, that a given kind of statute should not be enacted by a state, may strip it, for the time, of its conditional powers. But, there is also the unconscious will, which consists in thinking nothing, enacting nothnig, but which nevertheless is an inhibition of what would otherwise be within the competence of the state. Some kinds of

[5]Leicy vs. Hardin, 135 U. S. 100.

things the state can not do, even though the congress is dumb with respects thereto. Other kinds of things, such as pilotage, regulation of speed in interstate trains regulating the navigable streams the state may do, until some inhibitory legislation has issued from congress. In such cases the law of the state loses its authority. But, it seems that Fuller, C. J., has discovered a third class of cases. The state may have no power to legislate in a certain way on a certain subject, until an act of congress (not mere silence) removes "obstacle" to the operation of the state law. When that "obstacle" is removed the will of the legislature of the state becomes efficient over the whole of the area over which it intended to operate.

But, what is this obstacle? It is that the sale of an import in the original package is an act of interstate commerce. Can congress abolish that fact? Can it reverse the decisions of the courts as to what the Constitution meant by commerce among the state? But, that is precisely what it is doing if **In re Rahrer** is correct. The Chief Justice says congress simply removed an impediment to the enforcement of the state laws in respect to imported packages, but it removed the impediment by legislatively saying that a sale which was within the scope of the Federal commerce power, and not within that of the states, should be treated by the courts as within the latter; a heroic way, surely, of overcoming an embarrassment.

If the state's actual control of an interstate transaction can thus be secured, its control over any other such transaction can be in a similar way secured. Congress may abdicate its function of regulation of international and interstate commerce, by willing that "obstacles" shall be removed to the state's control, by allowing "imported property to fall at once upon arrival within the local jurisdiction." C. J. Fuller professes to per-

ceive no reason "why, if congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it cannot do so;" that is, congress can either make that not to be a subject of interstate commerce, which is such a subject, or it may subject interstate commerce to state action; that is, may widen, in violation of the Constitution, the scope of the state's power over commerce.

In Leisy, vs. Hardin, 135 U. S. 100, deciding that a state prohibitory law could not operate on a sale by the importer of an original package, the same Chief Justice, Fuller, prepared the way for the enactment of the Wilson bill, by saying that "a subject matter which has been confided exclusively to congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action." Again he says, "as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or in other words, what is or is not a regulation of such commerce."

Again he says "the responsibility is upon congress so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." If this is correct doctrine, then the Constitution makers did not intend that a central legislature should, to the exclusion of the state legislatures, manage international

and interstate commerce. They only intended that the central legislature should manage it, until it chose to allow that management to the state legislatures. The perspicacity of the recent justices who made this discovery of the intention of the men of 1787 is admirable. How astonishingly it transcends the vision of the earlier justices, who supposed that matters of interstate commerce, that were national in character, had to be regulated by congress.

In **in re Rahrer,** there is still another doctrine to be noticed. The Kansas act, forbidding sales, all sales, sales of imported liquors in original packages, as well as others, was passed before the Wilson Act. As to sales of such imported liquors, it was inoperative; it was void. But, this partially void act of the state was made entirely valid by the act of congress. Says Fuller, C. J., "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to congress, but of a law which it was competent for the state to pass but which could not operate upon articles occupying a certain situation until the passage of the act of congress." But, if congress has by the Constitution received the whole power to regulate interstate and international commerce and the states have divested themselves of such power, how can it be said that a state law, in as far as it acts on interstate commerce, is making an "authorized exercise" of a power. And what power is that to regulate commerce, which cannot regulate it? There are many prohibitions on state action. A state can not pass an **ex post facto** law. May congress release it from this incapacity? May the inability of a state to pass laws ,impairing the obligation of contracts, granting titles of nobility, be removed by the will of congress?

The Constitution mentions several cases in which the state may not legislate without the consent of con-

gress. If the makers of the Constitution when transferring from the states the power to regulate commerce with foreign nations, etc., intended to transfer it only provisionally, only until congress should consent to the exercise of it by the states, how regrettable that they have not expressed this qualification, but have compelled the justices of the court to ferret it out by the exercise of prodigious acumen.

However, apparently thinking that an act void at its passage by a state legislature, could not be made valid by an act of congress, the court concludes that an act not void, but incapable of operation, can by a later act of congress be made capable of operation, so that a conviction for its violation, could be secured.

The Chief Justice attempts to explain how the Act of Congress gave operativeness to the state statute by saying "Jurisdiction attached not in virtue of the law of congress, but because the effect of the latter was to place the property where jurisdiction could attach." The act of congress did not affect the place of the property, the keg of beer. The place was determined by the act of the owner. To say that congress places it where the state's jurisdiction could attach, is simply an evasive way of saying that congress made operative on the keg, and its sale a statute of Kansas that was previuosly not operative, by requiring the courts to conceive, to think, that the sale was not an act of interstate, but an act of intra-state commerce. The act is simply a direction to the courts not to adhere to their definition of commerce, or the definitions thereof, held by the Constitution makers, but to adopt one which subjects interstate commerce to state control, by ordaining that it shall be considered something that it is not.

Not to Will is to Will

Among peculiar notions that appear in the discussions of the judges of the Supreme Court, is the thought that congress wills by not willing. The Constitution enumerating the powers of congress, says, "The congress shall have power to lay and collect taxes; to borrow money; to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," etc. This has been held to be a transfer from the states to the central government, of this power. The power transferred is no longer in the state from which it is taken, but in the United States, acting by its organ, the congress. It would follow, that since the power to regulate international and interstate commerce had been surrendered by the states, they could no longer exercise it, and any state legislation, presupposing the existence of this power, would be void. Its voidness could not be the result of the will of congress, that it should not exist, but of the will of the states, in ratifying the Constitution, that the power to enact it should not any longer exist in them.

It is not to the credit of the Federal Courts, therefore, that after laying down the principles just stated, they should think it conducive to conviction that the states could not regulate interstate commerce, to aver that the "failure of congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the states except in matters of local concern." Robbins vs. Taxing District of Shelby County, 120 U. S. 489. In re Rahren, 140 U. S. 545. In the former of these cases, an imposing list of cases making coincident decisions, or uttering consonant dicta, is presented.

In such cases it is unnecessary to find a will of congress. The will of the makers of the Constitution is, when discovered, enough, and there is no lack of confidence manifested by the judges that they have ascertained that will. Yet the justices of the supreme court are infested with the notion that in some way it is the will of congress that takes from the states the power to regulate interstate commerce. A specimen of the hallucination is found in **In re Rahrer,** supra. After saying that the **power** of congress to regulate commerce among the states, when the subjects of that power are national in their nature, is exclusive (that is, exclusive of state power), the opinion adds: "The Constitution does not provide that interstate commerce shall be free, but, by the **grant** of this **exclusive** power to regulate it, it was left free except as congress might impose restraint. Therefore, it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of **its will** that the subject shall be free from restrictions or impositions upon it by the several states. * * * And if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the congress and the state can not occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws in pursuance thereof."

Note the inconsequence of this language. (1) The Constitution takes from the states the power to regulate interstate commerce. Hence, any attempted state regulation is void; void not because it clashes with the will of congress, but because it is the pretended exercise of a non-existent power. But (2) even if the state had the power, the "acknowledged power," its exercise of it would be a nullity, if that exercise conflicted with the will of congress, and the will of congress is expressed by doing nothing.

But, this is a wholly inadmissible doctrine. Not acting is not acting. Not thinking, not willing, is not thinking or willing. Not legislating may be the result of oblivion, inattention, indifference to the topic to be legislated upon. Not to will is not the same as to will, though the will be that something shall not be.

But, how may congress constitutionally express its will? Only by a writing, a statute or a resolution. The Constitution says that every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary except on a question of adjournment, shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the case of a bill," and every bill must be presented to the President. If he approves, he must sign it. The will of congress has no existence except in bill, order, resolution, and is a nullity unless and until it is presented to the President. How, then, is a so-called "will" of congress, not written, not formally voted, not submitted to the President, of any efficiency whatever? How can it nullify a power, which, but for it, the state legislatures would have? The allegation that it can is simply preposterous.

And the introduction of the notion that congress by doing nothing acts was wholly unnecessary. Some powers may coexist in state and United States. Some powers may coexist, until the exercise of them, by the United States, which exercise suspends, for the time destroys, the similar power of the state. The state may regulate pilotage, the rates of speed of railroad trains, even when engaged in interstate commerce, etc., until congress regulates them. When congress passes a

regulation, not by not acting, but by acting, the state's power lapses. There are other powers which, originally in the states, were transferred from them, by the ratification of the Constitution, to the United States. These powers are no longer in the states, and, hence they can do nothing which presupposes their posession of such powers. The power to say what articles, if of commerce, shall enter the state, and be once sold in it by the importer, is one of these dead powers. The non-continuance of the power in the state, is the sole and sufficient reason for the voidness of any legislation which could be valid only as an exertion of such power.

Yet, C. J. Fuller, in **In re Rahrer, supra,** after saying that the power of congress to regulate commerce among the states, when the subjects of the power are national in their nature, is exclusive (that is, exclusive of a power to regulate it elsewhere, and therefore in the states) ineptly adds that the failure of congress to exercise this exclusive power, is an expression of its will that the states, which have it not, shall not exercise it, as if any will of congress that a non-existent power any where, should not be exercised, were necessary, and as if inaction could be sensibly construed into action.[1]

[1]Cf. Clark Distilling Company vs. Western Maryland Rway. Co. 242 U. S. 311; Commonwealth vs. Jacobson, 72 Super. 38. The Webb-Kenyon Act of Congress of March 1, 1913.

MOOT COURT

GALLOWAY vs. TRUST CO.

Trusts and Trustees—Trust for Settlor's Use—Reservation of Power to Dispose by Will—Creditors—Attachment.

STATEMENT OF FACTS.

Mary Ansley a widow with eight children, the oldest only 15 years of age, received from her husband (deceased) $40,000 in securities. She conveyed this to a trust company with the understanding that she was to be paid the interest thereon, without being able to touch the principal, the principal, however, to be paid at her death to her legatees, or in absence of a will to her next of kin. Six years thereafter she asked Galloway for a loan of $1,600, telling him his only security would be the periodic income from the trust. Galloway hesitated for a period but finally lent the money. Partial payments were made, but $1,400 of the money remained unpaid. Galloway secured judgment for $1,450 against Mrs. Ansley and attached the funds in the X Trust Company. The lower court decided that he can compel the X Trust Company to pay him only the income, and no part of the trust itself.

H. Cohen for plaintiff.

Beaver for defendant.

OPINION OF THE APPELLATE COURT.

Caldwell J.—On first sight the only question presented in this case is whether or not a person sui juris can place his property beyond the reach of creditors by placing it in a trust fund which he is unable to touch during life, but retain the power to dispose of it by will when he dies. Much has been said on this question, as to how far the creator of the trust may go in reserving to himself rights concerning the property which he would protect from creditors by placing it in a "spendthrift" trust. Whether or not the creator had the power to revoke the trust, or whether or not he had the right to convey the trust funds at death without rendering the trust void as regards creditors, have all been discussed at great length in the books.

The Supreme Court of Pennsylvania, however, in the late case of Benedict vs. Benedict, 261 Pa. 118, has decided that in order to make a trust of this nature valid as against subsequent creditors, the settlor must divest himself of all rights or ownership in, and control over the property thus conveyed, re-

serving to himself only the right to receive the income during life. Otherwise the trust is void. The case further holds, concerning the retention of the right by the settlor to convey at death, that this retention of authority renders the trust void. The facts are practically identical with the case at bar.

Were we stating the law of Pennsylvania, under the peculiar facts in this case ,the court might be inclined to think differently from the law as laid down in Benedict vs. Benedict. Here Mrs. Ansley specifically told Galloway that her money was tied up in a trust fund. She further informed him that he could hope for no security other than the periodic payments of interest. Galloway hesitated before lending the money. This very fact shows that he was calculating the probabilities or receiving payment of the amount lent, from the periodic installments which Mrs. Ansley received. Was he not to a certain extent estopped from denying that he had lent the money knowing that his sole security was the periodic income, that the principal was tied up, and that he took his chance upon receiving payment solely from the interest money which Mrs. Ansley received.

In our opinion Galloway was in the position of a purchaser for value with full notice. He did not lend the money under the belief that Mrs. Ansley had ready access to the principal of her estate. He had been specifically warned to the contrary. It would seem to us that the ends of justice would be best served by holding that the defendant could recover on the security upon which he lent the money, namely the periodic payments.

Unfortunately for the defendant in this proceeding however, the law of Pennsylvania as laid down in Benedict vs. Benedict, 261 Pa. 118, is binding upon this court and we must therefore hold that the trust money in question is attachable for the debt of the creator, Mrs. Ansley. In accordance with this decision, the verdict of the learned court below holding the money unattachable must be

REVERSED.

OPINION OF THE SUPREME COURT.

The opinion of the learned court below shows that it has ample authority, prima facie, in the adjudication of the courts of Pennsylvania, Nolan vs. Nolan, 218 Pa. 135; Benedict vs. Benedict, 216 Pa. 118.

If Mary Ansley had retained absolute power over the remainder after the life estate, she might be regarded as vir-

tually owning the fee, with power to dispose of it. But she did not have such absolute power. She could only dispose of it by will. The residue, after the life estate, could not be controlled by her in such way as to become tributary to her own personal advantage. It had to go, either to the legatees, or to the next of kin, and could not be converted into cash, by her, by any means.

We have then, an unchangeable dedication of the remainder, after the life estate, to others than Mrs. Ansley. If she cannot subject it to her interests directly, why should she do so indirectly, by contracting debts, and authorizing the creditors to do so?

That the conveyance was fraudulent as to Galloway, is an inadmissable proposition. Rather was he guilty of fraud, in not disclosing an intention to annul the trust estate if he entertained it, at the time of the loan or, in forming and attempting to execute that intention later. He tacitly assented to the declaration that his only security could be the periodic income, when he permitted Mrs. Ansley to take the loan, under the belief that the corpus of the trust was exempt from executions, and that he assented to its exemption.

We think, had the learned court not decided that it would be to assist Galloway to perpetrate a fraud to sustain his attachment, it could not be convicted of taking an unsound position.

We shall, however, affirm its decision, in defference to the silence of the courts, as to the effect of a similar set of facts.

AFFIRMED.

COMMONWEALTH vs. INMAN.

Arson—Evidence of a Subsequent Distinct Criminal Act, but Connected in Character and Purpose with the Offense Charged, is Admissable.

STATEMENT OF FACTS.

Inman is on trial for firing a house on July 27. That he did the act was proven by circumstances. One of these was that five days after, viz: August 1, he attempted to set fire to the house. Defendant objected to proof of a second crime at the trial for another. The court admitted the evidence.

Doi, J.—It is a general rule that a subsequent criminal act is not admissible on trial for the first crime. However, if the second crime is connected in character and purpose with the offence charged, such evidence is admissible. That Inman had an intent to burn the house is clearly shown by his attempt to

burn the house. The fact that he did attempt to burn the house five days after, is connected with the first crime In that there is continuity of intent and purpose. The admission of this evidence does not necessarily mean that he is guilty of the first crime. It is admitted for the jury to weigh such evidence.

If the defendant's attempt was absolutely disconnected with the burning of the house, for example, if he had attempted to kill a man, or steal a horse, such evidence is not admissible on trial for the charge of arson. Here, a house is burned and five days later, the defendant is caught, attempting to burn the house. He may not be the one who burned the house on July 27 but the fact that he attempted to burn the house is of such a similar character, and because it shows the defendant's intent to burn this house, it is admissible. It was so held in Kramer vs. The Commonwealth, 87 Pa. 299. The facts of the case just cited are exactly identical with the facts of the case at bar.

ANY EVIDENCE, either before or afterwards, to show purpose in the mind of the defendant to destroy this house is admissible.

EXCEPTIONS OVERRULED.

OPINION OF THE SUPERIOR COURT.

The second attempt to burn the house was not proved to show a tendency to commit arson generally, but to show a purpose to destroy the particular house by fire. If this purpose existed on August 1, it not improbably existed five days before. There is an improbability that two persons conceived the purpose, within the space of five days, to burn the same house. Hence, the attempt on August 1, was a relevant piece of evidence and admissible.

The judgment of the learned court below must be AFFIRMED.

STOKES vs. BLAINE

Negotiable Instrument—Bill or Note Given as Collateral Security Makes Indorsee Bona Fide Holder for Value—Where Note is Due Before Maturity Bearer Must Sue and May Hold Proceeds.

STATEMENT OF FACTS.

To Stokes, X was indebted $500. X had a note of Blaine's for $1000 which he transferred to Stokes for collateral security. This note was payable on July 10, 1918, suit is brought September 11, 1918. X's debt does not mature until May 7, 1919. X

has objected to the suit until his own debt becomes due. Stokes contends that he has a right to the $1,000.

Smith for plaintiff.

Stevens for defendant.

OPINION OF THE COURT.

Warfield, J.—The facts in this case are: To Stokes X was indebted $500. X had a note of Blaine's for $1,000, which he transferred to Stokes for collateral security. This note was payalbe on July 10, 1918, suit is brought September 11, 1918. X's debt does not mature until May 7, 1919. X has objected to the suit until his own debt becomes due. Stokes contends that he has a right to sue now, and that he has a right to the $1,000.

The questions presented under this set of facts are: First, has the plaintiff, Stoeks, a right to sue on the note at this time? And, second, has he a right to the $1,000 until the maturity of the original debt?

As for the first question we are of opinion that the plaintiff may sue on the note given as collateral security at any time after it becomes due. The bill or note of a third party given as collateral security and indorsed to the creditor, for a debt contracted at the time of such indorsement, makes the indorsee a bone fide holder for value in the usual course of business and entitles him to protection against equities, setoffs, and other forms of defenses available between antecedent parties. And the same principle applies when the note is payable to bearer, and is transferred to creditor by delivery. Daniels on Neg. inst. 771. 24 Dickinson Law Review 71, states, "Where B, before the maturity of the note, endorsed it to X, X then became a holder for value, and could enforce the note, even if B had not been able to enforce it." This same doctrine is to be found in Miller vs. Pollock 41 Pa. 214, which is cited by the above author.

The original maker of the note is under obligation to pay the note when it becomes due and to make such payment to the holder of the note whoever that may be. Justice Sergeant in Lishy vs. O'Brien, 4 Watts 141, says, "it is 'res inter alios acta,' with which he has nothing to do. His duty is to fulfill his contract by paying the legal holder." This doctrine is reiterated by Justice Mastrazat in 199 Pa. 17, in Delaware County Trust, Safe Deposit and Title Insurance Company vs. Haser.

Question two then is as to the use to which the proceeds of the note shall be placed. The proceeds of the note are still the collateral security for the debt and we do not think that it would be in the power of the indorser to recall the security

merely because of its change of form. The debtor has received the advantage of shifting the duties of holder on the indorsee and has thus received an advantage which is good consideration in itself even if the plaintiff did not forgo anything in the way of watchfulness and concern about his debtor that he would otherwise have exercised. If the debtor cared to give such collateral security for his debt and the creditor accepted it at the debtor's word it is for the debtor and not the creditor to suffer. Dan. Neg. Inst. 773.

Judgment for the plaintiff.

OPINION OF THE SUPREME COURT.

The collateral note matured before the note representing the debt. Did this fact prevent suit upon it until the latter note became suable? The court has rightly answered negatively. The note was enforceable according to its own terms. Blaine could not take advantage of the fact that Stokes held it, not as absolute owner but merely as security; Cf, Overton vs. Taylor, 31 Pa. 346, an example of suit on a collateral note, before the maturing of the principal note.

The second question has been properly answered by the learned trial court. The $1,000 note is a unit. It cannot be broken into two parts, one to be enforced by Stokes, and the other later by X. Stokes has a right to receive the whole amount. Indeed as custodian of the note circumstances might require him to sue on it, on the first opportunity, neglect to do which, would make him liable for any ensuing loss to X.

If Stokes obtains $1,000 from Blaine he will be liable to account for the surplus. He will be a trustee of the surplus for X. Camden Nat. Bank vs. Freis-Breslin Co., 214 Pa. 395.

The judgment of the learned court below is

AFFIRMED.

HARPER vs. SUMMERS

Evidence—Witnesses—Party Dead. Act May 23, 1887.

STATEMENT OF FACTS.

Three days before X's death, while he was in good health, X permitted Summers to take into his possession an automobile. Summers was a nephew. After X's death, Harper, his executor, claiming that the automobile was a part of X's estate, brought this replevin. Summers alleges that X gave the automobile to him. His own testimony was rejected. That of his wife was received to prove the gift. Harper proved a statement

by X, made severally to three persons that he had lent the automobile to Summers for a month. The court told the jury that a mere preponderance of evidence for the gift was not enough. Verdict for Harper. Motion to set aside for new trial.

Barnhart for Plaintiff.

Stapleton for Defendant.

Coglizer, J.—The main question in this case is whether or not the charge of the court was correct. The jury was instructed that mere preponderance of evidence for the gift was not enough. The attorney for the defense contends that the law laid down in the charge to the jury is incorrect and cites a Nebraska case, Wylie vs. Charlton, 43 Nebr. 840, as being the authority that a preponderance of evidence is sufficient to establish a parole gift of land and it need not be established beyond a doubt. This, however, is not the law in Pennsylvania.

As a general rule to establish a gift inter vivos there must be a preponderance of clear, explicit and convincing evidence in support of every element needed to constitute a valid gift.

In Scott vs. Reed, 153 Pa. 14, Justice Hendrick says, "Where an alleged donor has been surrounded durnig his last sickness by the family and relatives of the alleged donee and the claimant has had opportunities to obtain possession of the subject of the alleged gift without title, the proof in support of the claim ought to be clear and satisfactory upon every point essential to title by gift."

It is necessary by this kind of evidence to establish competancy of donor, delivery, acceptance and the parting by the owner with his control or right of dominion over the subject of the gift. This rule is especially applicable when the gift is not asserted until after the donor's death.

In Fiscus' Estate, 13 Pa. Super. 615, it was held that, to establish a gift inter vivos after the death of the alleged donor, requires clear and satisfactory evidence upon every point essential to title by gift.

When competency of the donor, delivery, acceptance, and the parting by the owner with his control or right of dominion over the subject of the gift, have all been established, there is something more than "a mere preponderance of evidence."

It is not necessary for us to decide whether all the elements of a gift were present. This matter has already been settled. The correctness of the court's instruction is the only matter that need be considered. In our opinion the instruction was correct. Motion to set aside for new trial

REFUSED.

OPINION OF THE SUPREME COURT.

The alleged gift of the automobile occured in the life time of X. He has since died, Claim of the automobile is made after his death, by the supposititous donee.

The donee's testimony was properly rejected in obedience to the Act of 1887. He was made incompetent by X's death. The fact that made him incompetent also made his wife incompetent. Bitner vs. Boone, 128 Pa. 71; Paschael vs. Fels, 207, Pa. 567; Henry, Trial Evidence p. 417. The error of admitting her testimony has been deleted by the verdict in favor of Harper. The jury has disbelieved the testimony of Summers' wife.

The statement of X, thrice made, that he had lent the automobile to Summers, was not admissible. It was self-regarding, made in the absence of Summers. No objection, however, seems to have been made to it.

The trial court held that a mere preponderance of evidence was enough to establish the alleged gift. This seems inconsistent with the doctrine that the evidence, when the donor is dead, must be clear, and satisfactory. Fross Appeal, 105 Pa. 258; Wise's Estate, 182 Pa. 168. "A mere preponderance of evidence," says Stewart, J., "will not suffice to sustain a gift where the question arises after the death of the alleged donor." Smith's Estate, 237 Pa. 115. It is necessary then that the judgment of the learned court below be

REVERSED.

ESTATE OF JEFFERSON

Real Property—Mortgages—Construction of Words "Under and Subject to" the Mortgage—Act of June 12, 1878, P. L. 205—Rights of Vendor—Personal Liability of Vendee for Mortgage

STATEMENT OF FACTS.

Adamson owned a tract on which he had placed a mortgage of $4,000. He had also given a bond for that amount. He estimated the tract worth $8,000 and sold it to Jefferson for $4,000, "under and subject" to the mortgage. Later the tract was sold in foreclosure of the mortgage for $2,500. Adamson, to avoid suit on the bond, had to pay and did pay $1,500 to the mortgagee. Jefferson having died, and his estate undergoing distribution, Adamson claims the $1,500.

Segal for the plaintiff.

McDonough for the defendant.

OPINION OF THE COURT.

Schnee, J.—Counsel for the defendant contends that the defendant is relieved from liability to reimburse the plaintiff, for the amount which the latter was compelled to pay in satisfaction of his bond, by virtue of the Act of June 12, 1878, P. L. 205. This is not an action between the holder of the incumberance and the grantee who took title subject to that encumbrance. The Act of 1878 applies to the relations between the grantee and the holder of the incumbrance; it does not affect the covenant of the grantee to protect the grantor against loss through his personal liability for the debt to which the conveyance of the land has been made subject; May's Estate, 218 Pa. 64. "The words 'under and subject' in a conveyance import that the grantee takes the land subject to an incumbrance, the amount of which has been deducted from the agreed price and the covenant to be inferred from it is that of indemnity for the protection of the grantor." Faulkner vs. McHenry, 235 Pa. 298. This is not a covenant that the grantee will be personally liable for the debt, nor is it a covenant that he will indemnify the grantor against loss by reason of the existence of the incumbrance; Tritten's Estate, 238 Pa. 555. The incumbrance, to which the land was by the conveyance made subject, was a part of the consideration for the grant and the covenant of indemnity for the protection of the grantor was as much a continuing liability as an obligation to pay a fixed sum of money; it should be discharged only by compliance with its terms; Kirker vs. Wylie, 207 Pa. 511. A vendee or grantee of property taken expressly subject to a mortgage makes the debt his own; and if, on sale upon the mortgage there is a deficiency which the vendor is obliged to pay on his bond, he may recover in an action against the vendee; 70 Pa. Superior Court 373; 160 Pa. 191; 88 Pa. 450; 49 Pa. 518. Trickett, in Dickinson Law Review, Vol. XVIII, page 170, in the case of Sargeant vs. Myers, holds the following: "The decisions thus far pronounced on the Act of 1878 have left it absolutely unintelligible. They and it should be eliminated by new legislation. Meantime we must hold that the Act of 1878 applies to the grantee and the holder of the incumbrance only, and not to the grantor and grantee."

In view of the above facts judgment is for the plaintiff.

OPINION OF THE SUPERIOR COURT.

When Jefferson bought the land "under and subject to" the mortgage, he indicated (a) that he was aware of the charge on the land and assumed the risk of its being sold for it. But he

did more. He agreed (b) to indemnify his vendor, Adamson, against any liability by reason of that debt. May's Estate, 218 Pa. 64. The indemnity was not conditioned upon the ability of the land to repay the vendor. It was a personal charge. Hence, the sale of the land having left $1,500 of the debt unpaid, for which, on his bond, Adamson was liable, he had the right to pay this amount and have recourse for repayment to the guaranty. Land to the value of $1,500 had been put into the possession of Jefferson who was not to pay for it, except when it became necessary to pay it, in order to protect Adamson. When he pays it, he merely completes the payment of the purchase price, which he had contracted to pay.

Jefferson has died and his personal estate is undergoing distribution. Adamson, as a creditor, is claiming from the funds. He has a right to be paid. The learned court below has properly held that he must be paid. Hence its decree must be affirmed, and the appeal therefrom

DISMISSED.

ARMSTRONG vs. KOUNTZ

Contracts — Real Property — Partial Performance —Ejectment— Failure to Pass Good Title as Warranted; Amount of Money to be Returned.

STATEMENT OF FACTS.

Armstrong made a written contract to convey a farm to Kountz for $5,000 and to warrant the title. Kountz adhered and on four installments paid $3,000 of the purchase price. He then discovered a defect in the title, which he notified Armstrong to remove, but which was not done. Two years have elapsed since the last instalment of the price should have been paid, but $2,000 remains unpaid. This is an action to recover possession.

Bartram for plaintiff.

Shelley for defendant.

OPINION OF THE COURT.

McCready, J.—The question to be decided in this case is, whether or not, a vendor who had made a written contract with a vendee for sale of land and to warrant title, can eject the vendee and recover possession when the vendee, after making partial payments, stops further payments because of a defect in title which he has discovered and notified vendor of, but the

vendor has failed to remove the defect or refund the partial payment of purchase price.

The vendor contracted by written agreement to make a good and sufficient title to the vendee in consideration of the purchase money, agreed by the latter to be paid. But upon discovery of a defect in title and notification of the defect by the vendee to the vendor, when part of the purchase price was paid, the vendor failed to prove to the satisfaction of the vendee that he held a marketable title and that he could fulfill his part of the contract entered into.

In Holmes vs. Woods and Frew, 168 Pa. 530, it is held that a doubtful title which exposes the holder of it to litigation is not marketable, and the rule in equity is, that the purchaser will not be compelled to accept it. Since the vendee did not have to accept the title and the vendor did not tender payment to vendee, of the part purchase price paid by him, he cannot maintain an action of ejectment against the vendee because in Nicol vs. Carr, 35 Pa. 381, it clearly states that if a vendor cannot make such a title as the vendee is bound to accept, he must refund what has been paid and bring an action of ejectment. The point of law evoked in this case is sustained in the following citations:

Erwin vs. Meyers, 46 Pa. 111; Freetly vs. Barnhart, 51 Pa. 281; Youngman vs. Linn, 52 Pa. 418; Graver vs. Scott, 80 Pa. 93; Herzberg vs. Irwin, 92 Pa. 49; Mitchell vs. Steinmetz, 97 Pa. 254; Herman vs. Somers, 158 Pa. 428.

The latest citation on the point is that of Holmes vs. Fulton, 193 Pa. 271.

We are of the opinion that the vendee cannot be ejected, nor that possession can be recovered by the vendor until he has returned the part purchase price paid by the vendee and at that time he may bring an action of ejectment.

Verdict for defendant.

OPINION OF THE SUPREME COURT.

Kountz refuses to pay the remainder of the purchase money agreed upon, because of the defect of Armstrong's title. He contracted for a good title. A vendee cannot be compelled to pay the contract price, if the title he expected to obtain cannot be passed to him by the conveyance.

The vendee, on discovering the defect of title, may refuse to complete performance; but if he does so, he must surrender

possession. He cannot keep for nothing, land which he agreed to pay for, because the title is not as good as he hoped for. He must pay or give up the possession. The vendor may expel him by ejectment.

A further time will be extended for payment, however, a grace specified in the verdict. If payment in that time is made, possession may be retained. If it is not made, the judgment for the verdict becomes absolute, and a habere facias possessionem will issue on it, under which the vendee will be expelled. All his rights in the land will be extinct.

But in this case, $3,000 has been paid by the vendee before the discovery of the badness of the title. The vendor in two years after notice, has failed to rectify the defect. It would be inequitable to expel the vendee until the money paid by him has been returned. He has had possession of the land for some years. So much of the value of this possession as exceeds the interest on the money paid to Armstrong, should be deducted from the $3,000 and the judgment for Armstrong should be conditioned on his paying the balance back to Kountz.

As the judgment below is unconditionally for the defendant, it must be reversed, and a venire facias de novo awarded.

REVERSED.

PATTON vs. DODGE

Master and Servant—Recovery of Judgment Against Servant No Bar to Action Against Master Where Servant has not Satisfied Judgment—Torts.

STATEMENT OF FACTS.

The plaintiff was injured by the chauffeur of the defendant. Previous to this action the defendant had brought suit against the chauffeur and obtained a judgment for $500. This judgment not being satisfied, plaintiff brings this action against the defendant as master of the chauffeur. Defendant claims that judgment against the chauffeur is a bar to this action.

OPINION OF THE COURT.

Marcus, J.—A judgment for $500 was obtained against the chauffeur. To this there is no dispute. The dispute, however, arises when the plaintiff, not being able to secure satisfaction of the judgment seeks to sue and obtain judgment against the master.

Two questions arise. First. Was the injury inflicted during the course of the chauffeur's line of duty? Second. Having al-

ready obtained a judgment against the servant, can the injured party sue and obtain a judgment against the master?

Since there is no evidence to the contrary, it must be presumed that the chauffeur was performing a part of his duties when the accident happened. Although there are many cases of joy riding and loose handling of machines without the authority of the owner, yet we must not place a misdeed against a servant unless it is showed to be so by evidence. There is but one remaining point to be answered.

It is a well known rule and principal of law that a master is liable for the acts of his servant, committed while in the performance of his duties. Yet this does not exempt the servant from liability. Both being liable there is no doubt that judgment could be obtained by suing one or the other. It seems that one was sued and judgment could not be obtained. What remedy then is the injured party to have? Is he to lose because of the failure to obtain a satisfaction of judgment of one of two guilty persons? Of these two, the servant should really be considered secondarily liable. Why then should not the plaintiff be able to sue the primarily liable party?

It is the practice of Pennsylvania, which allows a plaintiff to sue one, all, and several individuals who are joint tort feasors and obtain a verdict and judgment against one, several or all for the same tort, 200 Pa. 148, although only one satisfaction may be obtained.

Why then can we not consider master and servant in the same relative position as joint tort feasors, for the circumstances are similar? Surely then the master being just as liable as the servant, the injured party is entitled to a satisfaction. And therefore may sue and obtain judgment and execution against the master.

Verdict for plaintiff.

OPINION OF THE SUPREME COURT.

The question is: After a judgment has been obtained against a chauffeur for injury to the plaintiff, and an execution thereon has failed to obtain any satisfaction, can the principal be sued for the same injury?

The English rule, says Jaggard, on Torts, p. 341, is that a judgment against one of the several tort-feasors is a bar to an action against the others, although the judgment is not satisfied. The explanation is inappreciable.

The American rule is said to be different. The judgment against one tort-feasor is no bar to an action against the others.

Belcher vs. McChesney, 255 Pa. 394, introduces perplexity and doubt. There, 'a judgment' for $771 had been obtained against the employe. A suit was then brought against the employer. He offered the judgment in evidence, not as a bar to a recovery, but for the purpose of limiting the amount to be received to $771. The court excluded the evidence, with the result that the verdict was $4,750.

The Supreme Court reversed for the exclusion of the judgment. Some of the language used seem to imply that the fact that a judgment had been recovered, though not paid, barred any action against the employer, that is, to adopt the English rule. Further elucidation is necessary, we think, before a reversion to the English doctrine can be definitely justified.

Only the barest technicality can be urged in its support. It is fair that the master should respond for injuries caused by his servant in the course of the master's business. It is preposterous to say that the master's liability should be expunged by the previous action against the servant, issuing in judgment, but not in satisfaction.

We think the judgment of the learned court below must be AFFIRMED.

RIGGS vs. TERHUNE

Principal and Agent—Real Estate Broker—Assumpsit to Recover Commission Upon the Sale of Real Estate.

STATEMENT OF FACTS.

Terhune, desiring to sell a house for $10,000, employed Riggs, a real estate broker, to find a purchaser, for a commission of three per cent. Riggs directed the attention of Harrison to the property. After certain deliberation, Harrison decided not to buy at that price, and so notified Riggs. Six weeks later he learned that an objectionable building nearby was to be torn down. He, then not having any further communication with Riggs, applied to Terhune, who demanded $11,000, which Harrison agreed to pay; and the house was conveyed to him. Riggs sues for a commission of $300.

Shelley for plaintiff.

Davis for defendant.

OPINION OF THE COURT.

Chylak, J.—The question was whether, under the contract between the parties, it was the right of the defendant at his will, to terminate the arrangement into which they had entered,

and to discharge the plaintiff from his employment. If it was, there can be no recovery in this action, for the plaintiff was discharged before anything had been earned, according to terms of agreement. It is clearly shown in White vs. Benton, 96 N. W. 876, that a sale by the owner or principal revoked the broker's authority, and gave him constructive notice although actual notice of the sale was not given or communicated to the broker. It will be sufficient to make clear our views, to call attention to a few of the authorities which we regard as controlling upon the subject. See Storey on Agency 481, Ahren vs. Baker, (Minn) 24 N. W. 34; Goldsmith vs. Cook, 14 N. Y. Sup. 879; Gilbert vs. Holmes, 64 Ill. 548. We quote from Story as follows: "A revocation by operation of law may be by a change of condition or of a state producing an incapacity of either party. This proceeds upon the general rule of law that the derivative authority expires with the original authority from which it proceeds. The power of continuing in agency is founded upon the right of the principal to do the business himself and when that right ceases, the right to create an appointment or continuing the appointment of an agent already made for the same purpose, must cease also. In short the derivative cannot generally amount to more or exist longer than the original authority. In Ahren vs. Baker, which, like the case before us was an action to recover real estate commission, it is said, "A revocation may be shown by the death of the principal, the destruction of the subject matter, or the determination of the estate by sale, as well as by express notice." In Pepper and Lewis digest p. 2221, Vol. 2, we find "Where a broker is employed to sell land for his principal, and there is no stipulation in the contract as to the duration of the broker's employment, the principal may terminate the employment at any time and discharge the broker." In addition we cite a case on point, 46 Pa. 426, holding, "where one, as an agent for another, contracts to sell the lands of the latter for a consideration and there is no stipulation in the contract as to the duration of employment, the principal has the right to terminate it at any time and discharge the agent from his services without notice." This case does not show that the agent or broker was the procuring cause of the sale. In Gibbons vs. Monongahela River Consolidated Coal Company, 68 Superior 232, it is held that to entitle a broker to recover a commission for the sale of real property he must establish that he was the procuring cause of the sale according to the contract. This is usually a question of fact for the jury.

In order to recover in a case like this, the plaintiff must show

his employment, that the sale was made through his instrumentality and the thing sold, the terms of the sale, and person to whom it was made were all in accordance with the terms of his contract of his employment. In support we cite, Samuel vs. Luckenbach, 205 Pa. 428; 329 Pa. 180; Kifer vs. Yoder, 189 Pa. 305; Mayer vs. Rhoads, 135 Pa. 601; Henderson vs. Somnehon, 30 Pa. Sup. Ct. 182. In a certain sense it may be true that the purchase was in consequence of the broker's showing him the property, but for that, the purchaser may never have looked at the property nor entertained a thought of buying it at the time the broker told the purchaser about property in question; but in this case the evidence shows that it was at least due to another, distinct, and separate cause, viz, the objectionable building and that it would be contrary to law to permit the broker to recover. The simple answer as to his demand was that if the evidence was believed he did not cause the sale, that is, his agency was not the immediate and efficient cause of the sale and the law regards only proximate and not remote causes, Earp vs. Cummins, 54 Pa. 394; Kifer vs. Yoder, 198 Pa. 308; Hartley vs. Anderson, 150 Pa. 39; 48 Superior 382 (p. 386), Barrow vs. Newton.

In 172 Pa. 396, in the trial of the case the court charged the jury that as there had been no time fixed by the original agreement within which a sale should be effected, the plaintiff had a reasonable time within which to secure a purchaser and that the defendant could not within that time revoke his agency and relieve themselves of liability to pay the commission agreed upon. The case accordingly was decided in favor of the plaintiff. Upon appeal to the supreme court, the case was reversed and decided for the defendant, thus repudiating the above rule and laying down the principle that the principal could revoke even before a reasonable time had elasped, without incurring liability for the payment of the commission.

And what is a reasonable time is a question for the jury.

The plaintiff undertook not a continuous employment but an agency to sell land. Such contracts are revokable at pleasure unless the power to revoke is restrained by express stipulation or unless given for a valuable consideration.

We are therefore of the opinion that, under the contract of the parties, the defendant had the right to discharge the plaintiff from his services at any time. The plaintiff cannot recover in his action, and we therefore order that the plaintiff be non-suited.

OPINION OF THE SUPREME COURT.

Much energy has been expended by the learned court below in maintaining that the employment of Riggs was terminable at the option of Terhune, the defendant. We discover in the case, no evidence of an attempt to terminate it. The sole question is, did Riggs do that for which the commission was promised him?

What was that? Terhune employed Riggs to find a purchaser at $10,000. For this he was to get the commission. The inquiry then is, did he find the purchaser? He directed Harrison's attention to the house. Harrison might have purchased, as a result of this direction, but he did not. After certain deliberation, he decided not to buy at the price. He not only did not buy; he notified Riggs of his refusal. At this stage, then, there has been no earning of the commission, because there has been no finding of a purchaser.

Six weeks elapse. So far as appears, Riggs makes no further attempt to find a buyer. He sees no other person, and he does not again communicate with Harrison.

Within these six weeks, however, another influence begins to work on Harrison's mind. A deterrent of the purchase of the house was a nearby objectionable building. This building was to be torn down by its owner. Did Riggs have any agency in its demolition? No. This abolishment of the offending edifice, it is, that made Terhune's house, for the first time, seem to Harrison desirable, so desirable indeed that he was willing to pay the larger price ($11,000) which Terhune then demanded. Although the calling of the house to the attention of Harrison may have some agency in influencing the further sale, it was plainly insufficient to effect that sale. It resulted, immediately, in a declination. Another influence had to intervene, to generate the volition to buy in Harrison, an influence with which Riggs had no connection. Earp vs. Cummins, 54 Pa. 394; Barrow vs. Newton, 48 Superior 382, are apposite authorities. By also, Kefer vs. Yoder, 198 Pa. 308. Hartley vs. Anderson, 150 Pa. 391, are cases where the precedence of negotiation by the owner, with the buyer, to those of the agent, induced the decision that those of the agent were not the cause of the buyer's purpose to purchase.

The actual purchase by Harrison was not the act which Riggs was employed to affect. That was the purchase for $10,000 of the house, neighbored as it was by the repulsive structure. This Harrison rejected. The house he bought was not disfigured and depreciated by this structure; it was worth several

hundreds of dollars more, and Harrison bought it for $11,000.

The conclusion then is, that Riggs did not find a buyer, either for $10,000, or at any price, and therefore that Riggs has not earned his commission.

The judgment of the learned court below is

AFFIRMED.

BOOK NOTICE

Handbook of Admiralty Law by Robert M. Hughes, M. A. LL. D., 2nd Edition. The West Publishing Company, St. Paul, Minn., 1920.

This, the second edition of a very interesting book on a capital theme, is worthy of favorable comment. In 570 pages are treated in a score of chapters inter alia, General Average and Marine Insurance, Bottomry and Respondentia, Stevedore's Contracts, Tolls and Towage Contracts, Salvage Contracts of Affreightment and Charter Parties, Admirality Jurisdiction Torts, Torts resulting in death, Torts injuring property, Steering and Sailing Rules, Damages in Collision Cases, the Effect of Liability Act on Right and Liabilities of Owners, Maritime Liens, Etc. The number of decisions cited, possibly 1,600, is surprising. The pertinent federal statutes are given in full. A direct and pellucid style wins to the reading of the book, and the character of the author is a guaranty of the accuracy of its statements. The sections on Admirality Classies, the English Authorities, and the Colonial Admirality Jurisdiction are noteworthy.